

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA**

AMERICAN OVERSIGHT,
1030 15th Street NW, B255
Washington, DC 20005

Plaintiff,

v.

Case No. 19-1300

U.S. DEPARTMENT OF LABOR,
200 Constitution Avenue NW
Washington, DC 20210

and

U.S. DEPARTMENT OF JUSTICE,
950 Pennsylvania Avenue NW
Washington, DC 20530

Defendants.

COMPLAINT

1. Plaintiff American Oversight bring this action against the U.S. Department of Labor and the U.S. Department of Justice under the Freedom of Information Act, 5 U.S.C. § 552 (FOIA), and the Declaratory Judgment Act, 28 U.S.C. §§ 2201 and 2202, seeking declaratory and injunctive relief to compel compliance with the requirements of FOIA.

JURISDICTION AND VENUE

2. This Court has jurisdiction over this action pursuant to 5 U.S.C. § 552(a)(4)(B) and 28 U.S.C. §§ 1331, 2201, and 2202.

3. Venue is proper in this district pursuant to 5 U.S.C. § 552(a)(4)(B) and 28 U.S.C. § 1391(e).

4. Because Defendants have failed to comply with the applicable time-limit provisions of the FOIA, American Oversight is deemed to have exhausted its administrative remedies pursuant to 5 U.S.C. § 552(a)(6)(C)(i) and is now entitled to judicial action enjoining the agency from continuing to withhold agency records and ordering the production of agency records improperly withheld.

PARTIES

5. Plaintiff American Oversight is a nonpartisan, non-profit section 501(c)(3) organization primarily engaged in disseminating information to the public. American Oversight is committed to the promotion of transparency in government, the education of the public about government activities, and ensuring the accountability of government officials. Through research and FOIA requests, American Oversight uses the information gathered, and its analysis of it, to educate the public about the activities and operations of the federal government through reports, published analyses, press releases, and other media. The organization is incorporated under the laws of the District of Columbia.

6. Defendant U.S. Department of Labor (DOL) is a department of the executive branch of the U.S. government headquartered in Washington, DC, and an agency of the federal government within the meaning of 5 U.S.C. § 552(f)(1). DOL has possession, custody, and control of the records that Plaintiff seeks.

7. Defendant U.S. Department of Justice (DOJ) is a department of the executive branch of the U.S. government headquartered in Washington, DC, and an agency of the federal government within the meaning of 5 U.S.C. § 552(f)(1). DOJ has possession, custody, and control of the records that Plaintiff seeks.

STATEMENT OF FACTS

8. On February 1, 2019, American Oversight submitted FOIA requests to DOL and DOJ seeking records of their communications, if any, with and about Steve Wynn, whose casino business interests may have been impacted by federal rule changes concerning employee tip-pooling.

DOL FOIA Requests

9. On February 1, 2019, American Oversight submitted a FOIA request to DOL's Office of the Secretary, Office of the Deputy Secretary, Office of the Solicitor, and Wage and Hour Division, seeking:

All records reflecting communications (including emails, email attachments, text messages, voicemails, voicemail transcripts, messages on messaging platforms—such as Slack, GChat or Google Hangouts, Lync, Skype, WhatsApp, Facebook messaging, Twitter Direct Messages, or Signal—telephone call logs, calendar invitations, calendar entries, meeting notices, meeting agendas, informational material, talking points, any handwritten or electronic notes taken during any oral communications, summaries of any oral communications, or other materials) with Steve Wynn, Wynn Las Vegas, or Wynn resorts, or any individuals acting on Wynn's behalf, including any individuals with email addresses ending in @wynnlasvegas.com, @wynnresorts.com, @wynnmacau.com, @wynnpalace.com, or with the email addresses cspies@clarkhill.com and wmoschella@bhfs.com.

10. American Oversight requested that DOL search the following offices for records responsive to this request:

- i. The Office of the Secretary
- ii. The Office of the Deputy Secretary
- iii. The Front Office of the Office of the Solicitor
- iv. The Front Office of the Wage and Hour Division

11. American Oversight requested all responsive records from January 20, 2017, through the date the search is conducted.

12. On February 6, 2019, DOL acknowledged this request, assigning it tracking number 873478.

13. American Oversight has received no further communications from DOL concerning this request.

14. On February 1, 2019, American Oversight submitted a second FOIA request to DOL's Office of the Secretary, Office of the Deputy Secretary, Office of the Solicitor, and Wage and Hour Division, seeking:

All records reflecting communications (including emails, email attachments, text messages, voicemails, voicemail transcripts, messages on messaging platforms—such as Slack, GChat or Google Hangouts, Lync, Skype, WhatsApp, Facebook messaging, Twitter Direct Messages, or Signal—telephone call logs, calendar invitations, calendar entries, meeting notices, meeting agendas, informational material, talking points, any handwritten or electronic notes taken during any oral communications, summaries of any oral communications, or other materials) with the White House (including but not limited to anyone whose email ends in @who.eop.gov) about Steve Wynn, Wynn Las Vegas, or Wynn resorts.

15. American Oversight requested that DOL search the files of political appointees in the following offices for records responsive to this request:

- i. The Office of the Secretary
- ii. The Office of the Deputy Secretary
- iii. The Office of the Solicitor
- iv. The Wage and Hour Division

16. American Oversight clarified that “political appointee” should be understood as any person who is a Presidential Appointee with Senate Confirmation (PAS), a Presidential Appointee (PA), a Non-career SES, any Schedule C employees, or any persons hired under Temporary Non-career SES Appointments, Limited Term SES Appointments, or Temporary Transitional Schedule C Appointments.

17. American Oversight requested all responsive records from January 20, 2017, through the date the search is conducted.

18. By letter dated March 7, 2019, DOL acknowledged this request, and assigning it the same tracking number as American Oversight's first FOIA request, number 873478.

19. American Oversight has received no further communications from DOL concerning this request.

DOJ FOIA Requests

20. On February 1, 2019, American Oversight submitted a FOIA request to DOJ's Office of Information Policy, Office of the Solicitor General, and Civil Division seeking:

All records reflecting communications (including emails, email attachments, text messages, voicemails, voicemail transcripts, messages on messaging platforms—such as Slack, GChat or Google Hangouts, Lync, Skype, WhatsApp, Facebook messaging, Twitter Direct Messages, or Signal—telephone call logs, calendar invitations, calendar entries, meeting notices, meeting agendas, informational material, talking points, any handwritten or electronic notes taken during any oral communications, summaries of any oral communications, or other materials) with Steve Wynn, Wynn Las Vegas, or Wynn resorts, or any individuals acting on Wynn's behalf, including any individuals with email addresses ending in @wynnlasvegas.com, @wynnresorts.com, @wynnmacau.com, @wynnpalace.com, or with the email addresses cspies@clarkhill.com and wmoschella@bhfs.com.

21. American Oversight requested that DOJ search the following offices for records responsive to this request:

- i. The Office of the Attorney General
- ii. The Office of the Deputy Attorney General
- iii. The Office of the Associate Attorney General
- iv. The Office of the Solicitor General
- v. The Front Office of the Civil Division

22. American Oversight requested all responsive records from January 20, 2017, through the date the search is conducted.

23. On February 1, 2019, American Oversight submitted another FOIA request to DOJ, this time to the Office of Information Policy, Office of the Solicitor General, Civil Division, and Justice Management Division seeking:

All records reflecting communications (including emails, email attachments, text messages, voicemails, voicemail transcripts, messages on messaging platforms—such as Slack, GChat or Google Hangouts, Lync, Skype, WhatsApp, Facebook messaging, Twitter Direct Messages, or Signal—telephone call logs, calendar invitations, calendar entries, meeting notices, meeting agendas, informational material, talking points, any handwritten or electronic notes taken during any oral communications, summaries of any oral communications, or other materials) with the White House (including but not limited to anyone whose email ends in @who.eop.gov) about Steve Wynn, Wynn Las Vegas, or Wynn resorts.

24. American Oversight requested that DOJ search the following offices for records responsive to this request:

- i. The Office of the Attorney General
- ii. The Office of the Deputy Attorney General
- iii. The Office of the Associate Attorney General
- iv. The Office of the Solicitor General
- v. The Front Office of the Civil Division
- vi. The Front Office of the Justice Management Division¹

25. American Oversight requested all responsive records from January 20, 2017, through the date the search is conducted.

Subsequent Communications with the Office of Information Policy

26. The Office of Information Policy—which accepts FOIA requests on behalf of, *inter alia*, the Office of the Attorney General, the Office of the Deputy Attorney General, and the Office of the Associate Attorney General—assigned the first FOIA request tracking number DOJ-2019-001979, and formally acknowledged the request by letter dated March 1, 2019. To American Oversight’s knowledge, neither the Office of the Attorney General, nor the Office of

¹ The Justice Management Division, which acknowledged the request and assigned it tracking number 116720, has issued a determination on the request, which American Oversight found satisfactory and does not challenge. References to “Defendants” in the remainder of this Complaint thus do not include DOJ’s Justice Management Division, whose actions Plaintiff does not challenge.

the Deputy Attorney General, nor the Office of the Associate Attorney General have assigned separate tracking numbers to this request.

27. The Office of Information Policy assigned the second FOIA request tracking number DOJ-2019-001984, and formally acknowledged the request by letter dated March 1, 2019. To American Oversight's knowledge, neither the Office of the Attorney General, nor the Office of the Deputy Attorney General, nor the Office of the Associate Attorney General have assigned separate tracking numbers to this request.

28. American Oversight has received no further communications from the Office of Information Policy, the Office of the Attorney General, the Office of the Deputy Attorney General, or the Office of the Associate Attorney General concerning either FOIA request.

Subsequent Communications with the Office of the Solicitor General

29. On a February 1, 2019 telephone call with the Office of the Solicitor General, American Oversight agreed to aggregate the two FOIA requests for purposes of a search of the Office of the Solicitor General's files for responsive records.

30. By letter dated February 13, 2019, the Office of the Solicitor General acknowledged American Oversight's first FOIA request, assigning it tracking number 2019-127373. Based on the February 1, 2019 telephone call, American Oversight's understanding is that this tracking number applies to both requests.

31. American Oversight has received no further communications from the Office of the Solicitor General concerning either FOIA request.

Subsequent Communications with the Civil Division

32. On February 6, 2019, upon realization of an error in the email address it had used to submit its requests to the Civil Division, American Oversight resubmitted each request to the Civil Division at the proper email address.

33. On February 7, 2019, the Civil Division acknowledged both FOIA requests, consolidating them and assigning them tracking number 145-FOIA-16527.

34. American Oversight has received no further communications from the Civil Division concerning either FOIA request.

Exhaustion of Administrative Remedies

35. As of the date of this complaint, Defendants have failed to (a) notify American Oversight of any determination regarding its FOIA requests, including the scope of any responsive records Defendants intend to produce or withhold and the reasons for any withholdings; or (b) produce the requested records or demonstrate that the requested records are lawfully exempt from production.

36. Through Defendants' failure to respond to Plaintiff's FOIA requests within the time period required by law, American Oversight has constructively exhausted its administrative remedies and seeks immediate judicial review.

COUNT I

Violation of FOIA, 5 U.S.C. § 552

Failure to Conduct Adequate Search for Responsive Records

37. Plaintiff repeats the allegations in the foregoing paragraphs and incorporates them as though fully set forth herein.

38. Plaintiff properly requested records within the possession, custody, and control of Defendants.

39. Defendants are agencies subject to FOIA and must therefore make reasonable efforts to search for requested records.

40. Defendants have failed to promptly review agency records for the purpose of locating those records that are responsive to Plaintiff's FOIA requests.

41. Defendants' failure to conduct an adequate search for responsive records violates FOIA.

42. Plaintiff is therefore entitled to injunctive and declaratory relief requiring Defendants to promptly make reasonable efforts to search for records responsive to Plaintiff's FOIA requests.

COUNT II
Violation of FOIA, 5 U.S.C. § 552
Wrongful Withholding of Non-Exempt Responsive Records

43. Plaintiff repeats the allegations in the foregoing paragraphs and incorporates them as though fully set forth herein.

44. Plaintiff properly requested records within the possession, custody, and control of Defendants.

45. Defendants are agencies subject to FOIA and must therefore release in response to FOIA requests any non-exempt records and provide a lawful reason for withholding any materials.

46. Defendants are wrongfully withholding non-exempt agency records requested by Plaintiff by failing to produce non-exempt records responsive to its FOIA requests.

47. Defendants are wrongfully withholding non-exempt agency records requested by Plaintiff by failing to segregate exempt information in otherwise non-exempt records responsive to its FOIA requests.

48. Defendants' failure to provide all non-exempt responsive records violates FOIA.

49. Plaintiff is therefore entitled to declaratory and injunctive relief requiring Defendants to promptly produce all non-exempt records responsive to its FOIA requests and provide indexes justifying the withholding of any responsive records withheld under claim of exemption.

REQUESTED RELIEF

WHEREFORE, American Oversight respectfully requests the Court to:

- (1) Order Defendants to conduct a search or searches reasonably calculated to uncover all records responsive to Plaintiff's FOIA requests;
- (2) Order Defendants to produce, within twenty days of the Court's order, or by such other date as the Court deems appropriate, any and all non-exempt records responsive to Plaintiff's FOIA requests and indexes justifying the withholding of any responsive records withheld under claim of exemption;
- (3) Enjoin Defendants from continuing to withhold any and all non-exempt records responsive to Plaintiff's FOIA requests;
- (4) Award Plaintiff the costs of this proceeding, including reasonable attorneys' fees and other litigation costs reasonably incurred in this action, pursuant to 5 U.S.C. § 552(a)(4)(E); and
- (5) Grant Plaintiff such other relief as the Court deems just and proper.

Dated: May 6, 2019

Respectfully submitted,

/s/ Cerissa Cafasso

Cerissa Cafasso

D.C. Bar No. 1011003

/s/ Katherine M. Anthony

Katherine M. Anthony

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Pro hac vice motion to be submitted

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*Member of the MA bar only; practicing in the District of Columbia under the supervision of members of the D.C. Bar while application for D.C. Bar membership is pending.

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